

Appendix H

Exemptions & the Arsenic Rule

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United States
Environmental
Protection Agency

Exemptions & the Arsenic Rule

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EXEMPTIONS & THE ARSENIC RULE

Exemptions are a tool that can be used by States to provide water systems with extra time to comply with the revised maximum contaminant level (MCL) for arsenic. Through exemptions, States can act before the MCL goes into effect – enforcement typically does not provide this benefit – and move water systems more expeditiously toward compliance. Exemptions enable States and water systems to work together to craft system-specific strategies for building capacity to comply with the arsenic MCL and for the long-term. For some systems, exemptions can provide up to 9 additional years beyond the effective date of the MCL in which to achieve compliance. However, we anticipate that States will grant systems only as much additional time as is needed to build capacity and come into compliance.

Without exemptions, water systems might not begin to move toward compliance until the effective date of the Arsenic Rule. Exemptions encourage water systems to start down the path to compliance now, so that public health is better protected.

Exemptions are administrative tools that States can use in their long-term strategies to build capacity in drinking water systems. They give eligible systems additional time to build capacity in order to achieve and maintain regulatory compliance while continuing to provide acceptable levels of public health protection.

States can use exemptions during the implementation of the Arsenic Rule. Exemptions can help ensure that systems which are unable to comply with the arsenic maximum contaminant level (MCL) on January 23, 2006 will have the opportunity to gain the resources needed to comply with the rule in an appropriate period of time. EPA encourages the use of exemptions as a means of providing additional time to eligible systems.

This document shows how exemptions can be granted in a straightforward and streamlined manner. It is divided into 2 sections. Section 1 explains in a question and answer format how the applicable laws and regulations can be translated into a workable set of exemption guidelines. Section 2 is a “How To” guide demonstrating how straightforward granting an exemption can be. It includes two forms that can simplify the exemption process. The first is a form for systems to use in requesting for an exemption. The second is a form for States to use when determining whether to grant an exemption. Both forms are accompanied by line-by-line instructions that explain the information needed and the types of paperwork necessary to document an exemption.

SECTION 1: EXEMPTION Q&A

1. What is an Exemption?

Exemptions are administrative tools that allow water systems additional time to come into compliance with a drinking water standard. Public Water Systems (PWSs) are required to meet the new arsenic MCL of 10Fg/L by January 23, 2006 (40 CFR 141.6[j]). If granted an exemption, a PWS would have an additional 3 years to comply (January 23, 2009). Systems serving fewer than 3,300 persons could be eligible to renew the exemption for up to 6 additional years. Therefore, some small systems may be granted exemption extensions allowing up to 9 total years (14 years since the rule was published) to obtain financial assistance and implement a compliance strategy (January 23, 2015).

This Q&A explains what States need to consider in granting exemptions and suggests a simple, straightforward, and effective manner in which States can document their decisions regarding exemptions.

2. Which systems are eligible for exemptions?

A system is eligible for an exemption if, at a minimum, it meets all four of the following criteria (40 CFR 142.20[b] and Safe Drinking Water Act [SDWA] section 1416[a]):

1. “Due to **compelling factors**, the PWS is unable” to achieve compliance by January 23, 2006 through any means, including treatment or developing an alternative source of water supply.
2. “The PWS **was in operation**” by **February 22, 2002** or, if not in operation by February 22, 2002, the system has “no reasonable alternative source of drinking water” available to it.
3. The exemption “will not result in an **unreasonable risk to health**.”
4. The system cannot reasonably make **management and/or restructuring changes** that would result in compliance or improve the quality of the drinking water if compliance cannot be achieved.

Section 2 provides a simple form that States could use to document system eligibility for an exemption and, if appropriate, the findings and conditions associated with granting an exemption.

3. How can a system indicate its interest in receiving an exemption?

Section 2 also provides a simple form that systems could use to request an exemption. States can modify the form to fit their needs. Systems that need exemptions will generally have limited technical, financial, and managerial capacity. Therefore, States and technical assistance providers may want to make a special effort to alert systems to the potential availability of exemptions and

to assist them in completing an application such as that suggested in Section 2.

4. Under what minimum conditions may an eligible system receive an exemption from the Arsenic MCL?

To receive an exemption from its State, an eligible PWS must, at a minimum, be “taking all practicable steps to meet” the MCL (40 CFR 142.20[b] and SDWA section 1416[b][2][B]). In addition, no exemption should be granted by a State unless the PWS establishes that:

- C in order to meet the MCL, the system needs capital improvements that cannot be completed prior to January 23, 2006;
- C in the case of a system that needs financial assistance for the necessary improvements, the system has entered into an agreement to receive the necessary financial assistance or has demonstrated that such financial assistance, either from a federal or State program, is “reasonably likely to be available within the period of the exemption”; or
- C the system has entered into an enforceable agreement to become part of a regional water system (SDWA section 1416[b][2][B]).

For example, a PWS that needs capital improvements and requires financial assistance could provide written documentation showing its position on the Drinking Water State Revolving Fund (DWSRF) priority list. Alternatively, the PWS could document its loan agreement with a private lender, or, document its written and enforceable agreement to become a part of a regional PWS.

When reviewing a system’s need for capital improvements that cannot be completed prior to January 23, 2006, the State should determine whether it is feasible for the system to design an appropriate treatment train, obtain sufficient funding, and install the treatment technology by January 23, 2006. Systems should consider installing a Best Available Technology (BAT), and small systems should consider installing a small system compliance technology (SSCT) listed in the final Arsenic Rule. Systems and States should consider the possibility of upgrading the system’s existing treatment capabilities and the installation of additional treatment technology. If modification or installation before January 23, 2006 is not feasible due to compelling circumstances, the system may be eligible for an exemption.

In addition, the State must consider whether the system can develop or gain access to an alternative water source by January 23, 2006 (40 CFR 142.20[b]). The feasibility of establishing a partnership to use a neighboring system’s source must be considered along with the development of a new source (40 CFR 142.20[b][1][ii]). PWSs and States should consider whether the characteristics of the new source would require the system to treat for other contaminants and, consequently, make the new source prohibitively costly to use. If, due to compelling reasons, the system cannot implement measures to develop an alternative source before January 23, 2006, the system may be eligible for an exemption.

EXEMPTION ELIGIBILITY ISSUES

5. What are “compelling factors?”

As a minimum condition for receiving an exemption, a system must be unable to achieve compliance by January 23, 2006 due to compelling factors (40 CFR 142.20[b] and SDWA section 1416[a][1]). According to the SDWA, compelling factors may include economic factors, including qualification of the PWS as a system serving a disadvantaged community pursuant to section 1452(d). SDWA section 1452(d) defines a disadvantaged community as “the service area of a PWS that meets affordability criteria established after public review and comment by the State in which the public water system is located.” Other compelling factors affecting a system’s ability to comply may be identified by the State case by case.

6. How can a PWS beginning operation after February 22, 2002 qualify for an exemption?

At a minimum, a PWS that begins operation after February 22, 2002 must show that it has “no reasonable alternative source of drinking water” in order to qualify for an exemption (40 CFR 142.20[b] and SDWA section 1416[a][2]). Such a system should show that it is not feasible to develop an alternative source of water which has a lower level of arsenic or to access a neighboring system’s water source. A system that successfully demonstrates it has no reasonable alternative source of drinking water may be eligible for an exemption. To be eligible, new systems still must meet all other exemption eligibility criteria that apply, including:

- C The presence of compelling factors.
- C The absence of unreasonable risk to health.
- C The lack of available management or restructuring changes that would result in compliance or, if compliance cannot be achieved, would improve water quality.

7. What constitutes an “Unreasonable Risk to Health?”

An exemption from the revised arsenic MCL requires, among other things, that the exemption will not result in an unreasonable risk to health. An exemption to an MCL allows a PWS to continue to provide water at some level above the MCL for a specified period of time, after which the system must come into compliance.

In this guidance, EPA is suggesting an approach to determine what does **not** constitute an unreasonable risk to health with respect to arsenic. The approach is based on the fact that Congress included exemption provisions in the SDWA with the clear intention that they be used to address the needs of economically challenged systems for additional time to achieve compliance. Congress explicitly contemplated that the customers of these systems would be exposed to drinking water above the MCL for the period of their exemption. The limit that Congress imposed on this excess exposure is that it not constitute an unreasonable risk to health.

EPA is suggesting a simple, conservative, and common-sense approach to determining what does not pose an unreasonable risk to health with respect to arsenic, rather than address the much more complex issue of what **does** constitute an unreasonable risk to health.

In reauthorizing the SDWA, Congress established a time frame for implementation that allows systems up to 5 years to comply. Under the revised MCL of 10 ppb, water systems are allowed to continue to operate at levels between 10 and 50 ppb for up to 5 years. Through the time frame allowed in SDWA, Congress made the tacit determination that these exposures will not pose an unreasonable risk of adverse health effects to the affected population. Based on that determination and on information suggesting a linear relationship between the arsenic dose and cancer risk, EPA is suggesting concentration levels that it believes will not pose an unreasonable risk to health for exemptions of various durations.

The previous arsenic MCL was 50 ppb. Affected systems must begin complying with the revised MCL of 10 ppb by January 23, 2006, five years from the date the Arsenic Rule was published (January 23, 2001). Thus, in principle, a system could be providing water with an arsenic level of 50 ppb until January 23, 2006 and be in full compliance with the SDWA. The system would remain in compliance if it reduced its arsenic level to 10 ppb or less on and after January 23, 2006.

Exemptions would extend the compliance date by 3, 5, 7, or 9 years depending on system size and number of extensions granted. The longest period a system could have to achieve compliance would be 14 years (the 5-year base of January 23, 2001-January 23, 2006 plus a 9-year exemption).

As a matter of regulation and policy, exposure at 50 ppb for the 5 years from January 23, 2001 to January 23, 2006 does **not** pose an unreasonable risk to health. This represents 40 ppb above the new MCL of 10 ppb (50 ppb - 10 ppb = 40 ppb). The total exposure above the new MCL for those 5 years is 40 ppb * 5 years = 200 ppb*years. This 200 ppb*years may be thought of as the “excess compliance-period exposure.” That is, it represents the exposure above what would have occurred if water systems had instantaneously complied with the revised MCL on January 23, 2001. It represents “excess exposure” that, as a matter of law and policy, does not pose an unreasonable risk to health.

In the context of exemptions for the Arsenic Rule, the concentrations of interest are #50 ppb and the time periods of interest are #14 years. For arsenic in general, and certainly within these ranges, the relationship between dose and response is linear. Thus, for an exemption, the determination of what concentration level and duration does not pose an unreasonable risk to health can be conservatively determined by limiting “excess compliance-period exposure” to #200ppb*years for the total compliance period including the full duration of an exemption. The following calculations clarify the application of this concept:

$$(5 \text{ years}) * (40 \text{ ppb}) = 200 \text{ ppb*years}$$

$$(8 \text{ years}) * (X_8) = 200 \text{ ppb*years}; (X_8) = (200 \text{ ppb*years}) / (8 \text{ years}) = 25 \text{ ppb}$$

Thus, for an initial 3 year exemption (which provides a total compliance period of 8 years), a concentration of 25 ppb above the MCL of 10 ppb (a total

concentration of 35 ppb) does not pose an unreasonable risk to health.

(10 years) * $(X_{10}) = 200 \text{ ppb} \cdot \text{years}$; $(X_{10}) = (200 \text{ ppb} \cdot \text{years}) / (10 \text{ years}) = 20 \text{ ppb}$
 Thus, for a 2-year extension to the initial 3 year exemption (which provides a total compliance period of 10 years), a concentration of 20 ppb above the MCL of 10 ppb (a total concentration of 30 ppb) does not pose an unreasonable risk to health.

(12 years) * $(X_{12}) = 200 \text{ ppb} \cdot \text{years}$; $(X_{12}) = (200 \text{ ppb} \cdot \text{years}) / (12 \text{ years}) = 17 \text{ ppb}$
 Thus, for two 2-year extensions to the initial 3 year exemption (which provides a total compliance period of 12 years), a concentration of 17 ppb above the MCL of 10 ppb (or a total concentration of 27 ppb) does not pose an unreasonable risk to health.

(14 years) * $(X_{14}) = 200 \text{ ppb} \cdot \text{years}$; $(X_{14}) = (200 \text{ ppb} \cdot \text{years}) / (14 \text{ years}) = 14 \text{ ppb}$
 Thus, for three 2-year extensions to the initial 3 year exemption (which provides a total compliance period of 14 years), a concentration of 14 ppb above the MCL of 10 ppb (or a total concentration of 24 ppb) does not pose an unreasonable risk to health.

Based on these calculations, EPA believes the values in the following table offer a conservative and appropriate framework for determining the duration of an exemption that will not pose an unreasonable risk to health for systems with various historical arsenic concentrations. Exemptions may be granted for indicated arsenic concentrations for the indicated time periods.

Systems Serving	Total Compliance Time after Promulgation	Exemption Periods Available	May an exemption be granted for these arsenic concentrations?				
			> 35 ppb	> 30 ppb but ≤ 35 ppb	> 25 ppb but ≤ 30 ppb	> 20 ppb but ≤ 25 ppb	≤ 20 ppb
> 3,300 persons	8 years	3 years (2006-2009)	No	Yes	Yes	Yes	Yes
≤ 3,300 persons	8 years	3 years (2006-2009)	No	Yes	Yes	Yes	Yes
	10 years	5 years (2006-2011) ^a	No	No	Yes	Yes	Yes
	12 years	7 years (2006-2013) ^b	No	No	No	Yes	Yes
	14 years	9 years (2006-2015) ^c	No	No	No	No	Yes

^aIncludes the initial 3-year exemptions available to all systems and the first of three 2-year small system extensions.

^bIncludes the initial 3-year exemptions available to all systems and two of three 2-year small system extensions.

^cIncludes the initial 3-year exemptions available to all systems and all three 2-year small system extensions.

Note that, in determining the arsenic concentrations allowable in small systems which receive the second and third exemptions available to them, EPA has chosen to round down the allowable concentrations relative to the values shown in the calculations discussed above. This rounding down provides an additional margin of safety, given the relatively long durations of elevated exposures that would be experienced by the individuals served by these systems.

This analysis is predicated on the assumption that a system will seek an exemption based on the historical concentration of arsenic in its source water. In other words, exemptions are not contemplated for systems that historically have had arsenic concentrations above 35 ppb, even if those systems have recently taken steps to reduce their concentrations to 35 ppb or less. Exemptions are intended to offer systems that face compelling circumstances and have had arsenic concentrations of 35 ppb or less additional time to comply with the revised standard of 10 ppb. Furthermore, exemptions are not envisioned to offer a stair-step path to compliance. Systems could not obtain a 3-year exemption with a concentration of 35 ppb, and then seek an extension to that exemption by blending or otherwise reducing their concentrations to 30 ppb. The total length of the exemption for which a system is eligible is determined by the historical concentration of arsenic in the system's source water.

8. What must the State consider to conclude that management or restructuring changes which will result in compliance or improvement in drinking water quality (if compliance cannot be achieved) cannot reasonably be made by January 23, 2006?

The regulation (40 CFR 142.20[b][1]) defines the measures a State must consider before determining that management or restructuring changes cannot reasonably be made by a system to achieve compliance or, if compliance cannot be achieved, improve the quality of its drinking water. This task need not be onerous or time consuming. Rather, the State can use information from existing files, site visit personnel, and telephone conversations with system managers to make determinations, and can quickly and briefly document such determinations. The form in Section 2 is an example of the type of streamlined documentation approach a State could take. In making the determination, the State must consider what a system could reasonably accomplish through all of the following (40 CFR 142.20[b][1][i]):

- C "Rate increases."
- C "Accounting changes."
- C "Appointment of a State-certified operator" (under the State's Operator Certification program).
- C "Joint operation with one or more PWSs" (through a contractual agreement).
- C "Activities consistent with the State's Capacity Development Strategy" (to help the PWS acquire and maintain technical, financial, and managerial capacity).
- C "Ownership changes."
- C "Consolidation (physical or otherwise) with another PWS."

In addition, the State must consider whether the DWSRF or other forms of federal or State assistance are "reasonably likely to be available" to implement the appropriate measures (40 CFR

142.20[b][1][i]). If none of these measures is feasible by January 23, 2006, the system may be eligible for an exemption if the other three criteria listed above in the answer to Question 2 are met. A State must document its findings when determining that appropriate management or restructuring changes cannot reasonably be made by January 23, 2006 (40 CFR 142.20[b][1]). Such documentation may conveniently be prepared using a form such as that suggested in Section 2.

GRANTING AN EXEMPTION

9. What must States document in granting an exemption to a system?

When a State grants an exemption to a PWS, it “must document all findings required under SDWA section 1416,” including the findings previously discussed in this Q&A (40 CFR 142.20[b][1] and 40 CFR 142.20[b][2]). States must provide the reasons for granting each exemption, including documenting the need for the exemptions and for the finding that the exemption will not result in unreasonable risk to health (40 CFR 142.15[a][3]). The documentation process does not need to be onerous or time consuming. In fact, a State can take a very streamlined and straightforward approach to documenting its findings. Please refer to Section 2 for an example of a streamlined approach to documentation that a State could take.

10. What else is expected from States during the exemption process?

EPA encourages States to have systems request an exemption as soon as possible after determining that compliance is not feasible. By beginning the exemption process early, States and systems have more time to set compliance schedules and identify the solutions necessary to bring systems into compliance.

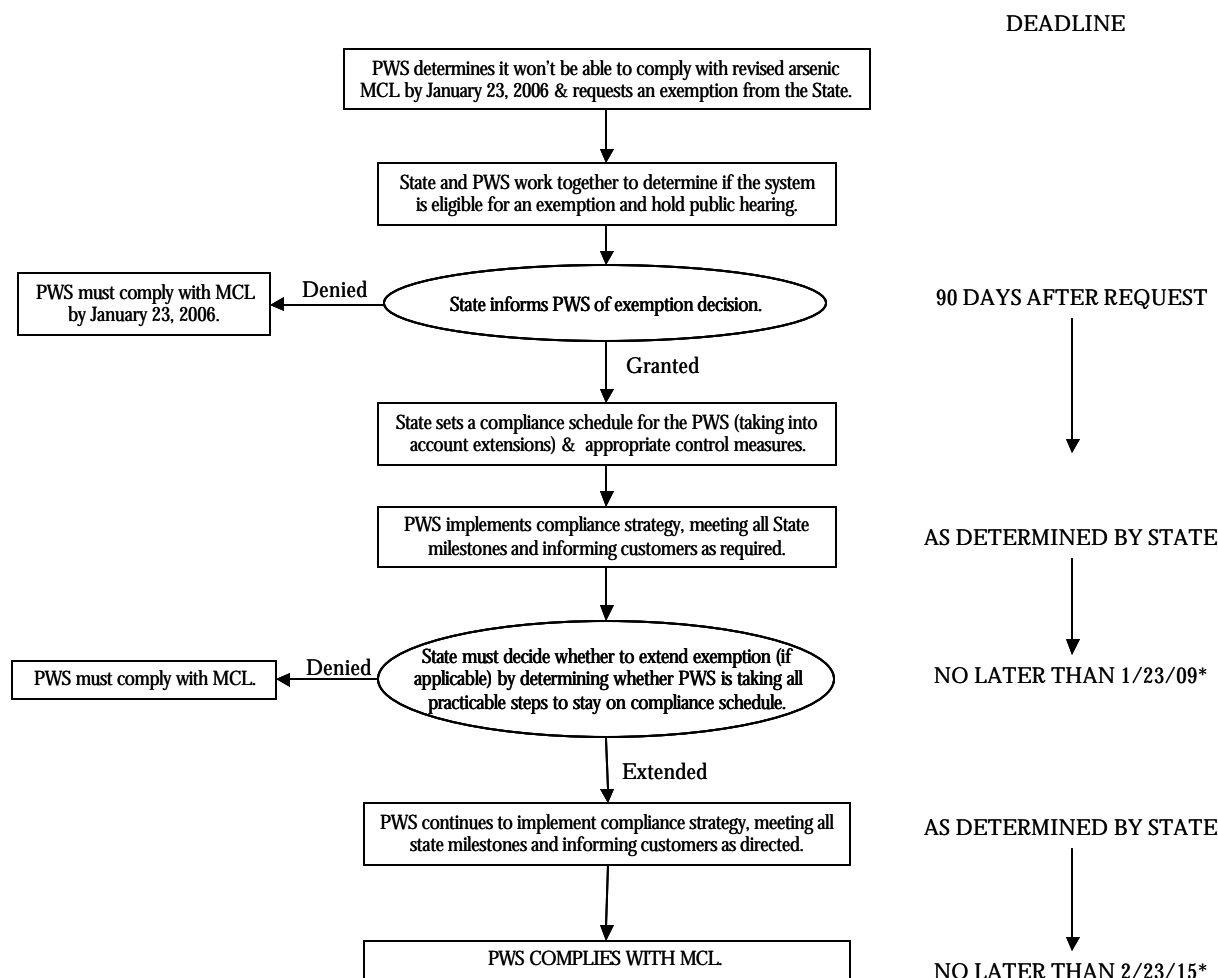
A State must decide whether to grant an exemption within 90 days (or less as prescribed by State rules) of receiving the exemption request (40 CFR 142.21). The State should use the information it has about the system, as well as supplementary information provided by the system, to determine whether the system is eligible. Section 2 offers an example of an “Exemption Request Form” for systems seeking an exemption. EPA suggests that States and technical assistance providers work with systems most likely to need exemptions to help them complete such a form.

When a State grants an exemption, it must at the same time set a compliance schedule for the system, including increments of progress, or milestones (40 CFR 142.20[b] and SDWA section 1416[b][1]). The schedule should require compliance as “expeditiously as practicable.” In addition, the State must prescribe a schedule for the system to implement control measures for arsenic during the period of the exemption (40 CFR 142.20[b] and SDWA section 1416[b][1]). Before the schedules for compliance and control measures take effect, the State must notify and give the public an opportunity to comment on the schedules (40 CFR 142.20[b] and SDWA section 1416[b][1]). None of these tasks need be overly burdensome. For example, States can hold joint hearings on groups of exemptions to minimize the administrative burden. Other efficiencies can be developed by States to streamline the process and make exemptions a viable and effective option for ensuring long-term compliance.

During the deliberation process, the State can also determine whether an extension will be necessary for an otherwise eligible system to implement its compliance strategy (including securing financial assistance). “The Agency interprets the extension provisions for public water systems serving less than 3,300 persons to allow the primacy agency to grant the additional two-year periods at the time of initial issuance of the exemption for those small systems that need financial assistance for the necessary improvements” (63 FR 43843). These extensions provide States the flexibility to develop feasible compliance schedules (i.e., longer than 3 years). Systems should understand that, although their compliance schedules may assume at least one exemption extension, extensions are not automatic. At the end of each exemption/extension, the State must conduct a review to ensure that the system is taking all practicable steps to comply with the MCL and the exemption compliance schedule provided by the State (40 CFR 142.20[b][2]).

If the State determines that a PWS is not taking all practicable steps to comply with the requirements, the exemption should not be renewed. The PWS should be subject to enforcement to address violations of the established schedule and the Arsenic Rule requirements. If the exemption is renewed, the PWS should be in full compliance with the Arsenic Rule at the end of the exemption period. Figure 2, below, summarizes the arsenic exemption process.

Figure 2: Example of Arsenic Exemption Process



*Last feasible date. EPA suggests taking action as early as possible.

11. Under what minimum conditions may an eligible system qualify for an exemption extension?

PWSs that receive exemptions and serve no more than 3,300 persons may be able to extend their exemptions by 2, 4, or 6 years. These extensions can be considered and granted when the State grants the original 3-year exemption.¹ These extensions provide States the flexibility to develop

¹For additional details, see Question 10.

compliance schedules longer than 3 years. A system is eligible to extend its exemption only if, at a minimum, it:

- C Proves that it is taking all practicable steps to meet the established schedule to achieve full compliance with the arsenic MCL.
- C Proves that it is taking all practicable steps to meet the MCL.
- C Is implementing all State-prescribed control measures.
- C Has entered into an agreement for, or is reasonably likely to obtain (from a federal or State program), financial assistance to make necessary capital improvements (40 CFR 142.20[b] and SDWA section 1416[b][2][C]).

States may grant up to three additional 2-year extensions during which systems are exempt from the MCL. The extensions should be based on how much time the system reasonably needs to come into compliance. A State must document its findings when extending an exemption (40 CFR 142.20[b][2]). Again, these findings can be based on easily acquired or readily available information and can be documented in a streamlined and straightforward manner.

12. What should a system do once an exemption is granted?

When granted an exemption by its State, a PWS should follow the compliance schedule and meet all milestones. The system should understand how it will need to show progress and meet all other requirements of the exemption. The system must also notify its customers of its exemption status (40 CFR 141.32(b)(1)).

HOW DO EXEMPTIONS FIT WITH OTHER PROGRAMS?

13. How can the DWSRF provisions and exemption provisions be used together?

Given the many competing demands placed on the DWSRF and other financial assistance programs, the flexibility to extend the period of time available for a system to receive financial assistance is important for States and systems. Exemptions help ensure that DWSRF assistance goes to PWSs most in need of such aid. Exemptions also allow systems that receive DWSRF assistance to be able to use it in a way that produces full compliance with an MCL.

The State must consider whether DWSRF assistance will likely be available to implement necessary changes (40 CFR 142.20[b][1][i]). This requirement to consider the DWSRF as a possible funding source does not mean that the State must provide DWSRF assistance to a system seeking an exemption. States retain full authority to allocate SRF funds.

Another major source of federal financial assistance for water systems is the Rural Utility Service Water and Environmental Programs (WEP). WEP provides loans, grants, and loan guarantees for drinking water in rural areas and towns of up to 10,000 persons. Public bodies, non-profit

organizations, and federally recognized Indian tribes are eligible for assistance. Over \$1.5 billion in financial assistance was available from WEP in fiscal year 2001.

14. Can the variance and the exemption provisions be used together?

PWSs that receive a variance for arsenic are never eligible for exemptions (SDWA section 1416[b][2][C]). However, a State may grant a general variance to a PWS after an exemption has been granted if “unforeseen changes in circumstances” during the exemption period make compliance unaffordable for the system. For instance, if a system installs a BAT during the exemption period, but still cannot comply with the MCL due to source water characteristics, the State may grant the system a general variance. For more information about how EPA defines “unforeseen changes in circumstances,” please refer to the document *Revision of Existing Variance and Exemption Regulations to Comply With Requirements of the Safe Drinking Water Act; Final Rule*.

OTHER TOOLS

15. How should States deal with systems that fail to meet the terms of their exemptions and come into compliance?

With appropriate State support and oversight, systems receiving exemptions should be able to achieve compliance by the time their exemptions expire. But in some States, systems may violate the terms of their exemptions or fail to be in compliance when their exemptions expire. In such situations, Administrative Orders (AOs) can be used by State administrative agencies to direct these systems to take positive steps toward compliance without the participation of the judicial system.

Often, States issue AOs to noncompliant systems after exhausting other administrative compliance options and instead of pursuing civil or criminal relief. An AO may include, among other things, a finding of violation, a compliance schedule with milestones, and a provision for assessing stipulated penalties for any violation of the AO’s terms. In most States, systems have the right to appeal the terms of the AO in the administrative arena (such as during an administrative hearing) or in the judicial system; States can commence contempt proceedings in a civil court, collection actions, receivership proceedings, or termination of service proceedings for violation of the AO’s terms.

States can use an AO to describe the conditions under which the system would be allowed to continue to operate after the violation or expiration of the exemption, while acknowledging that the system is in violation of the revised MCL. The terms of the AO would ensure that the system is taking the steps needed to come into compliance in accordance with a State-prescribed schedule.

In addition to unilateral AOs, States may have the option of entering into Administrative Consent Orders (i.e., stipulated agreements) with noncompliant PWSs. An Administrative Consent Order is a legal agreement between the State and the PWS in which the system agrees to pay for correction of violations and to take the required corrective action within an agreed upon period of

time. Stipulated agreements have the same force and effect as AOs and are effective when a system wants to comply and has committed to a compliance schedule.

However, stipulated agreements, AOs, and other enforcement tools should not be viewed as alternatives to exemptions. Exemptions are the tool of choice for helping eligible systems achieve compliance. Enforcement tools are used only after non-compliance has occurred. Congress explicitly created the exemption provisions to address the needs of systems facing difficult, “compelling” circumstances that preclude their being able to achieve compliance in the normal time frame. Exemptions can keep systems from ever being in non-compliance.

SECTION 2: HOW TO GRANT EXEMPTIONS

Granting an exemption can be simple and straightforward. For each exemption granted, it is important that the State works closely with the system to ensure that the exemption will result in compliance without jeopardizing the health of the system's customers. EPA encourages States to have systems request exemptions as soon as possible after determining that compliance is not feasible. This gives States and systems more time to identify solutions and set appropriate compliance schedules to attain compliance as quickly as possible.

This Section provides two sample forms:

FORM #1: EXAMPLE SYSTEM REQUEST FORM. States can use this form to collect important information from systems requesting exemptions.

FORM #2: EXAMPLE STATE DETERMINATION FORM. States can use this form to determine whether a system should be granted an exemption.

Each form is presented with step-by-step instructions. States can modify these forms to fit their needs.

States can use the **EXAMPLE SYSTEM REQUEST FORM** to gather information from each water system requesting an exemption. Systems needing exemptions will generally have limited technical, financial, and managerial capacity. Therefore, States and technical assistance providers may wish to make a special effort to alert systems to the potential availability of exemptions and to assist them in completing applications such as the one discussed below.

States can use the **EXAMPLE STATE DETERMINATION FORM** to determine whether a system should be granted an exemption (and if necessary, an extension). The form allows the State to quickly document each eligibility assessment.

FORM #1: EXAMPLE SYSTEM REQUEST FORM**PAGE 1 OF 2**

1	System Name:	2	PWSID:	
3	Contact Person:	4	Phone Number:	
5	Address:			
6	Date System Began Operating:			
7	Have you received a variance for arsenic?	9 YES	9 NO	
8	What is the range of arsenic levels in your finished water?	High:	Low:	
9	Summarize your treatment process:			
10	Arsenic treatment options considered:			
11	Current water rate structure:			
12	Does the system have a certified operator?	9 YES	9 NO	
13	What steps have you taken to meet the MCL?			
14	What capital improvements are needed?			
15	Why can't these improvements be made before 1/23/06?			

16	If financial assistance is needed, which of the following describes your system (include documentation):			
	C you have entered into an agreement to get the financial assistance		9 YES	9 NO
	C you are reasonably likely to get financial assistance from a Federal or State source		9 YES	9 NO
17	Assistance Source:	9 SRF	9 RUS	9 Other:
	Date Applied:		Contact:	
18	Have you entered into an enforceable agreement to become part of a regional PWS?			9 YES 9 NO
19	How much time do you need to:			
	C secure funding			
	C finish the capital improvement(s)			
	C begin operating in compliance with the new MCL			
	Total time needed to come into compliance			
20	If you began operation after 2/22/02, why can't your system use another source of drinking water with lower arsenic levels?			

Submitted by: _____

Date: _____

Please use the space below to provide any other information that you would like the State to know when considering your request:

SYSTEM REQUEST FORM INSTRUCTIONS & NOTES

- 1** Self explanatory.
- 2** Self explanatory.
- 3** Although the State should have system contact information on file, it is useful to have the most current information possible. This is particularly beneficial if someone besides the normal system contact is handling the exemption request.
- 4** Self explanatory.
- 5** Self explanatory.
- 6** Although the State will likely know when every system began operating, it is useful to verify this date. Systems that begin operations after February 22, 2002 must meet an additional eligibility requirement to receive an exemption.
- 7** Systems that have received a variance for arsenic are not eligible for an exemption. It is very unlikely that variances will have been granted.
- 8** Most systems should be able to provide a range of arsenic levels in their finished water from monitoring results for the current MCL. Systems that lack arsenic data should conduct sampling before applying for an exemption. The State will use these data to make its unreasonable risk to health determination.
- 9** The State can use the information about a system's treatment process and finished water arsenic levels to understand the treatment options that are available to a system. Using this information, the State may be able to suggest a low-cost strategy for modifying the treatment process or may determine that treatment modifications by January 1, 2006 are not feasible and affordable.
- 10** The State can use this information to ensure that systems have considered all reasonable arsenic compliance options. The State may be able to suggest strategies that the system did not consider.
- 11** Information about the system's current water rate structure allows the State to determine whether there are feasible water rate changes that would result in compliance or improve water quality.
- 12** The state can use this information to determine whether the system is in compliance with the State's operator certification requirements and to determine whether the appointment of a certified operator would result in compliance or improve water quality.
- 13** States can use this information to verify that the system is taking all practicable steps to comply with the revised MCL by January 23, 2006.
- 14** This information helps the State identify whether capital improvements are required.

SYSTEM REQUEST FORM INSTRUCTIONS & NOTES CONTINUED

- 15** The State must determine that these capital improvements cannot be completed before January 23, 2006 for the system to be eligible for an exemption.
- 16** If a system needs financial assistance to complete the necessary capital improvements, it must either have entered into an agreement (public or private) to get the assistance, or it must be reasonably likely to get the assistance from a federal or State source during the period of the exemption. The system should include documentation that supports its claim, such as a letter from the State identifying the system's position on the DWSRF priority list.
- 17** If financial assistance is needed, the system should identify the source of assistance, the date the system applied for assistance, and the system's contact in the assistance organization. This information will allow the State to determine whether the system is eligible for receiving an exemption.
- 18** Alternatively, a system may choose to enter into an "enforceable agreement" to become a part of a regional PWS.
- 19** States should work with each system receiving an exemption to develop realistic compliance schedules that require compliance as "expeditiously as practicable." Systems should provide an estimate of the time they need to secure funding, finish the needed capital improvement(s), and begin operating in compliance with the new MCL. States can use these estimates, along with their understanding of similar capital improvement projects, to develop realistic compliance schedules for the systems.
- 20** The State can use this information as a basis for determining whether a system that began operating after February 22, 2002 is eligible for an exemption. These systems are eligible for an exemption only if they can demonstrate that another source of drinking water with lower arsenic levels cannot reasonably be found.

FORM #2: EXAMPLE STATE DETERMINATION FORM
PAGE 1 OF 3

1	SYSTEM NAME		6	DATE BEGAN OPERATING	
2	POP. SERVED		7	REQUEST DATE	
3	SYSTEM CONTACT		8	DATE GRANTED	
4	PHONE NUMBER		9	PUBLIC NOTIFICATION DATE	
5	CONTACT ADDRESS		10	PWSID	

ELIGIBILITY DETERMINATION

CRITERIA				INFORMATION SOURCE			
11	Are there compelling factors that will prevent the system from complying by 1/23/06?		9 YES	9 NO*	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
					9 Exemption Request	9 Other:	
12	Did the system begin operating before 2/22/02?		9 YES	9 NO (see 12a)	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
					9 Exemption Request	9 Other:	
	12a. If the system began operating after 2/22/02, does the system have a reasonable alternative source of drinking water?		9 YES*	9 NO	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
					9 Exemption Request	9 Other:	
13	System's finished water arsenic range (ppb):		Years until compliance will be achieved (from 1/2001):		Excess Exemption Period Exposure	9 Sanitary Survey	9 Exemption Request
	High		Low		ppb*years	9 Other:	
14	Can the system reasonably make any of the following changes** with the result being compliance or improved water quality?		9 YES*	9 NO	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
					9 Exemption Request		9 Other:
	☐ Rate Increases ☐ Accounting Changes ☐ Appointment of State-certified Operator		☐ Joint Operation ☐ Capacity Development Activities		☐ Ownership Changes ☐ Consolidation		
15	DETERMINATION		9 YES – SYSTEM IS ELIGIBLE			9 NO – SYSTEM IS NOT ELIGIBLE	

* System is not eligible for an exemption.

**Given the potential availability of Federal and State financial assistance.

APPROVAL DETERMINATION

CRITERIA				INFORMATION SOURCE		
16	Has the system received a variance for the arsenic standard?	9 YES*	9 NO	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
				9 Exemption Request	9 Other:	
17	Is the system taking all practicable steps to meet the MCL?	9 YES	9 NO*	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
				9 Exemption Request	9 Other:	
18a	Does the system need to make capital improvements that cannot be completed before 1/23/06?	9 YES	9 NO	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
				9 Exemption Request	9 Other:	
18b	If the system needs financial assistance for capital improvements, has it entered into an agreement to obtain financial assistance OR shown that it is reasonably likely to get public assistance during the exemption?	9 YES (see 19)	9 NO	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
				9 Exemption Request	9 Other:	
18c	Has the system agreed to become part of a regional PWS?	9 YES	9 NO	9 Sanitary Survey	9 SRF Application	9 Capacity Assessment
				9 Exemption Request	9 Other:	
19	Financial assistance information.	Source:	9 SRF	9 RUS	9 Other:	
		Date Applied:				Source Contact:
20	DETERMINATION	9 YES - EXEMPTION GRANTED			9 NO - EXEMPTION DENIED	

* System is not eligible for an exemption.

Approved by: _____

Date: _____

EXEMPTION EXTENSION

CRITERIA				INFORMATION SOURCE	
21	Is the system eligible for a 3 year exemption?	9 YES	9 NO***		
22	Does the system serve 3,300 people or fewer?	9 YES	9 NO***		
23	Does the system need financial assistance?	9 YES	9 NO***		
24	Has the system agreed to become part of a regional PWS?	9 YES***	9 NO		
25	DETERMINATION	9 YES – EXTENSION APPROVED If yes, how many extensions and for how many total years (not to exceed 6):			9 NO – EXTENSION DENIED
		Extensions		Years	

*** System is not eligible for an extension.

Approved by: _____

Date: _____

STATE DETERMINATION FORM INSTRUCTIONS

- 1** Self explanatory.
- 2** The State should record the number of people the system serves, which will be used later if the State considers granting the system an exemption extension.
- 3** Self explanatory.
- 4** Self explanatory.
- 5** Self explanatory.
- 6** Systems that begin operation after February 22, 2002 must meet an additional requirement to be eligible for an exemption.
- 7** A State must decide whether to grant an exemption within 90 days (or less as prescribed by State rules) of receiving the request (40 CFR 142.21).
- 8** Self explanatory.
- 9** Before the compliance schedule takes effect, the State must notify and give the public an opportunity to comment on the schedule (40 CFR 142.20[b] and SDWA section 1416[b][1]).
- 10** Self-explanatory.

Questions #11-#15 allow States to determine if systems meet the 4 required criteria to be eligible for an exemption (40 CFR 142.20[b] and Safe Drinking Water Act [SDWA] section 1416[a]).

- 11** Compelling factors may include economic factors, including qualification of the PWS as a system serving a disadvantaged community pursuant to section 1452(d). Other compelling factors affecting a systems ability to comply may be identified by the State on a case-by-case basis.

Information sources for identifying compelling factors may include sanitary surveys, an SRF application, a capacity development assessment, and the exemption request. For instance, the Capacity Assessment Report for the system may note that "half the customers live near or below the poverty line." Record the information source(s) used to identify the compelling factors by checking the appropriate box(es).

STATE DETERMINATION FORM INSTRUCTIONS CONTINUED

- 12 & 12a** A system that begins operating after February 22, 2002 can be eligible for an exemption only if it has “no reasonable alternative source of drinking water” (40 CFR 142.20[b] and SDWA section 1416[a][2]). A system should show that it cannot develop an alternative source of water that has a lower level of arsenic and that it cannot access a neighboring system’s water source.

Although it is the responsibility of systems to show that there are no alternative sources of water, the State may find helpful information in sanitary surveys, an SRF application, a capacity development assessment, and the exemption request. An example would be a sanitary survey report map that shows a system is 40 miles from its nearest neighboring system. Record the information source(s) used to assess this criterion by checking the appropriate box(es).

- 13** States should grant only the time needed to bring the system into compliance as expeditiously as practicable. However, the maximum time allowed by EPA can be calculated as follows. Using the information from the form, the State can determine whether the excess exemption period exposure is #200 ppb*years by using the following equation:

$$(X \text{ years}) * (Y \text{ ppb}) = \text{_____ ppb*years}$$

- C X is the number of years from 1/2001 to the exemption compliance date.
C Y is the highest level of arsenic present in the system’s finished water.

Data for this calculation may come from sanitary surveys, an SRF application, a capacity development assessment, or the exemption request. If the system seeking the exemption submits a request form similar to the example provided earlier and reports that the highest level of arsenic in its finished water is 20 ppb and that it needs 8 years to come into compliance, the State could calculate the excess exemption period exposure (160 ppb*years). Record the data source(s) used to make this calculation by checking the appropriate box(es).

- 14** The regulation (40 CFR 142.20[b][1][i]) defines the measures a State must consider before determining that management or restructuring changes cannot reasonably be made by a system to achieve compliance or, if compliance cannot be achieved, improve the quality of its drinking water. In addition, the State must consider whether the SRF or other forms of federal or State assistance are “reasonably likely to be available” to implement the appropriate measures (40 CFR 142.20[b][1][i]).

States may use various information sources to assess management or restructuring changes, including sanitary surveys, an SRF application, a capacity development assessment, and the exemption request. For instance, a Capacity Assessment Report may find that the system has “sufficient” financial and managerial capacity, but “limited” technical capacity that cannot be remedied by consolidation because the system is too remote. Record the information source(s) used to assess management and restructuring changes by checking the appropriate box(es).

STATE DETERMINATION FORM INSTRUCTIONS CONTINUED

15 Eligibility determination should be simple and straightforward. Any system is eligible if it meets all 4 statutory criteria. Using this form, a system is eligible for an exemption if:

- C The State answered YES to Question #11.
- C The State answered YES to Question #12 or NO to Question #12 AND Question #12a.
- C The State determined the excess exemption period exposure is #200ppb*years in Question #13.
- C The State answered NO to Question #14.

If a State determines that a system requesting an exemption is eligible, it must decide whether to grant that exemption. States are required to document that they have considered the minimum criteria (40 CFR 142.20[b][1] and 40 CFR 142.20[b][2]). However, States are not obligated to grant an exemption, even if a system meets all the approval criteria listed in the form. Questions #16-#20 identify the minimum criteria that eligible systems must meet to be granted an exemption.

16 PWSs that receive a variance for arsenic are never eligible for exemptions (SDWA section 1416[b][2][C]).

It is very unlikely that variances will have been granted. The State may find documentation that the system has not received a variance for arsenic in, among other places, an application, a system request, or the State's file for the system. For instance, the system's file may contain a copy of a letter informing the system that its request for an arsenic variance was denied. Record the information source(s) used to ensure the system has not received a variance by checking the appropriate box(es).

17 To receive an exemption, an eligible PWS must, at a minimum, be "taking all practicable steps to meet" the MCL by January 23, 2006 (40 CFR 142.20[b] and SDWA section 1416[b][2][B]). The steps could include:

- C Designing, funding, and installing an appropriate treatment train (including BAT and SSCT).
- C Upgrading existing treatment capabilities.
- C Developing or accessing an alternative water source (including establishing a partnership to use a neighboring system's source).

Information sources for determining whether a system is taking all practicable steps may include sanitary surveys, an SRF application, a capacity development assessment, and the exemption request. For instance, the system's SRF application might describe how the installation of new treatment is necessary because the only current treatment is chlorination and developing an alternative water source is not feasible. The system's request form might show that while the system has applied for assistance, it is not likely to secure that financial assistance in time to comply by January 23, 2006. Record the information source(s) used to assess whether the system is taking all practicable steps by checking the appropriate box(es).

STATE DETERMINATION FORM INSTRUCTIONS CONTINUED

18a An eligible PWS may receive an exemption if it needs capital improvements that “cannot be completed” before January 23, 2006 (40 CFR 142.20[b] and SDWA section 1416[b][2][B]).

Information sources used to determine that the system needs capital improvements may include sanitary surveys, an SRF application, a capacity development assessment, and the exemption request. For example, the description of the system’s treatment process in the sanitary survey as “chlorination only” would allow the State to determine that capital improvements are needed. Record the information source(s) used to determine that capital improvements are necessary by checking the appropriate box(es).

18b An eligible PWS may receive an exemption if it needs financial assistance for necessary capital improvements AND it has either entered into an agreement to receive necessary financial assistance OR has demonstrated that financial assistance, either from a federal or State program, is “reasonably likely to be available within the period of the exemption” (SDWA section 1416[b][2][B]).

Information sources for determining that the system is likely to receive financial assistance may include sanitary surveys, an SRF application, a capacity development assessment, and the exemption request. Such documentation might include a letter stating the system’s position on the State DWSRF priority list. Record the information source(s) used to assess the system’s likelihood of receiving financial assistance by checking the appropriate box(es).

18c An eligible PWS may receive an exemption if it has entered “into an enforceable agreement to become a part of a regional PWS.”

The State is most likely to find the information needed to determine the system’s eligibility from either an SRF application or the exemption request. For example, the system might indicate on its exemption request form that it has agreed to become a part of a regional PWS. Record the information source(s) used to determine whether the system has agreed to become part of a regional PWS by checking the appropriate box(es).

19 The system should provide documentation supporting its answer to Question #18b. Record the source of its funding, the date the system applied for financial assistance, and the contact information for the funding organization’s representative.

20 Granting an exemption can be simple and straightforward. This form provides the minimum criteria that States must consider when deciding whether to grant an exemption to an otherwise eligible system. Using this form, an exemption can be approved if the system is eligible and:

- C The State answered NO to Question #16.
- C The State answered YES to Question #17.
- C The State answered YES to Question #18a, #18b, OR #18C.

STATE DETERMINATION FORM INSTRUCTIONS CONTINUED

During the exemption deliberation process, the State can also determine whether an extension will be necessary for an otherwise eligible system to implement its compliance strategy (including securing financial assistance). This provides States the flexibility to develop feasible compliance schedules (i.e. longer than 3 years). Systems must meet 4 criteria, which can be documented using Questions #21-#25.

- 21** Systems must first have been approved to receive a 3-year exemption to be considered for an exemption extension.
- 22** Only systems that serve no more than 3,300 persons are eligible for an exemption extension. Refer to Question #2 on the first page of the form.
- 23** Only systems that need financial assistance are eligible for an exemption extension. Refer to Question #18b on the second page of the form.
- 24** Systems that qualified for an exemption by agreeing to become part of a regional PWS are not eligible for an extension. Refer to Question #18c on the second page of the form.
- 25** Using this form, an extension can be approved if the State answered:
YES to Questions #21, #22, and #23, and NO to Question #24. In addition, the system must (40 CFR 142.20[b] and SDWA section 1416[b][2][C]):
- C Prove it is taking all practicable steps to meet the MCL and all practicable steps to meet the established compliance schedule.
 - C Be implementing all State-prescribed control measures.
 - C Have entered into an agreement for or be reasonably likely to obtain (from a federal or State program) financial assistance to make necessary capital improvements. (40 CFR 142.20[b] and SDWA section 1416[b][2][C]).

If a system meets all of the criteria listed above, the State may grant the system up to three additional 2-year extensions of the exemption. The number and length of the extensions should be based on how much time the system reasonably needs to come into compliance. To avoid an unreasonable risk to health, States must ensure that the “excess exemption period exposure” be limited to #200 ppb*years for the total compliance period (including the extension period). If the exemption is renewed, the PWS should be in full compliance with the Arsenic Rule at the end of the exemption period.

If extending the exemption, the State should record the number of extensions (maximum of 3) and the total years the compliance period will be extended (maximum of 6). Each extension may be for no longer than 2 years.